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No. 80-1579

In the Supreme Court of the United States

October Term, 1980

KURZ-KASCH, INC.,
Petitioner,

vs.

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 11,
Respondent.

- and -

KURZ-KASCH, INC.,
Petitioner,

vs.

PAUL W. WEIMER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 6, 1981

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QUESTION PRESENTED

1. Was the Court of Appeals correct in holding non-arbitrable a claim for retirement insurance benefits by retiree Weimer which arose three and one-third (3-1/3) months after the expiration of a collective bargaining agreement between the Union and the Company and one and one-half (1-1/2) months after the Company had permanently closed its facility, where the expired collective bargaining agreement provided for arbitration of employee grievances only, specifically arising under the agreement, and only at the request of the Union, when the Union made no such request?

SUMMARY OF ARGUMENT

The Petitioner has failed to demonstrate that the decision of the Court of Appeals for the Sixth Circuit is anything but consistent with the decisions of this Court and the decisions of other circuit courts. The Petitioner's argument rests all but exclusively on the broad presumption in favor of arbitrability. While the existence of this presumption cannot be denied, the Court of Appeals found that the presumption was sufficiently negated under the unique facts of the present case which pertained to alleged vested retirement insurance benefits allegedly surviving the bargaining agreement. The Petitioner has failed to cite a single authority in direct conflict with this decision. The sweeping generalizations and tenuous analogies relied upon by the Petitioner fail to demonstrate the necessity for resolution by this Court. The Petition for a Writ of Certiorari must be denied.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

For the reasons stated below, respondent, Paul W. Weimer, respectfully requests that the Petition for a Writ of Certiorari in his above-captioned case be denied.

STATEMENT OF THE CASE

A. Nature Of The Case.

This action was commenced by the filing of a class action Complaint by Respondent, Paul W. Weimer ("Weimer"), on behalf of himself and all other similarly situated retirees/former employees of Petitioner, Kurz-Kasch, Inc. ("Company"). (Pet. App. 50).[1] The Complaint was filed pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185, and alleged that the Company's unilateral discontinuance of health and life insurance benefits 3-1/2 months after the collective bargaining agreements existed and 1-1/2 months after the permanent shutdown of the Company's plant constituted a breach of certain provisions pertaining to group insurance coverage as provided in two collective bargaining agreements with the Company. By an order and judgment of the District Court on March 15, 1979, the complaint was dismissed. (App. 1, 2).

As reflected in the order of dismissal, the District Court dismissed this case solely on the basis of an arbitration decision in *Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11 v. Kurz-Kasch, Inc.* (Pet. App. 21). This was done in spite of the fact that Weimer had not been a party to the arbitration proceeding, and had been denied the right to intervene in the *Metal Polishers* case on two separate occasions. (App. 5, 6-7).

Weimer was never afforded a hearing on the merits of his claim by the District Court. No answer or other responsive pleading was ever filed by the Company.

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1. All citations to "Pet. App." refer to the Appendix in the Company's Petition for a Writ of Certiorari.

On appeal, the United States Court of Appeals for the Sixth Circuit considered Weimer's case and the Metal Polishers' case together, although no formal consolidation had occurred. (Pet. App. 1). Because of the "confused record" caused by the irregularity of the proceedings below, the Sixth Circuit chose not to reach the "highly technical claims of error" raised by the Union and Weimer on appeal. (Pet. App. 3). Rather, the Court found that under the unusual facts presented, the issues raised in the District Court were not subject to arbitration. Thus, the Court of Appeals remanded both cases to the District Court for decision on the merits.

B. Statement Of Facts.

The only facts which are contained in the record of this case are set forth in the complaint. (Pet. App. 50).

Petitioner, Kurz-Kasch, Inc. ("Company"), is an Ohio corporation engaged in business in Dayton, Ohio, and other locations within the State of Ohio. The Company entered into two separate collective bargaining agreements with the International Association of Machinists and Aerospace Workers, Local 225, and the International Molders and Allied Workers Union, Local 45 ("Unions"). Both collective bargaining agreements contained nearly identical provisions governing group insurance benefits. The agreement with Local 225 Machinists provided:

> "It is agreed that Employees who are sixty-two (62) years of age or over or who retire prior to that age by reasons of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment by the Company, *may, upon retirement, continue their participating in existing group insurance plans applicable to such Employee by pay-*

ing fifty percent (*50%*) of the premiums required for such insurance. *The Company agrees to pay all such group insurance premiums required for continuation* of existing Employee group insurance *with respect to any Employee* who reaches the age of sixty-five (65) or more and who has fifteen (15) years or more continuous employment by the Company and *who retires under normal retirement from active employment.* The Company agrees to pay all such group insurance premium required for continuation of existing Employee group insurance with respect to any Employee who retires prior to age sixty-five (65) years of age under disability retirement in accordance with Federal Social Security Law from active employment, provided, such Employee has fifteen (15) years or more of continuous employment. *It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees, are in fact, retired* and remain unemployed, either by the Company or by anyone else, and that right is reserved to the Company to pay such further retirement benefits in such cases as it may in its discretion determine advisable in individual cases."

(App. 8-9) (Emphasis added).

The collective bargaining agreement with Local 45 Molders provided:

"It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who have ten (10) years' continuous employment with the Company, *may upon retirement, continue their participation in existing group insurance plans applicable to such Employee by pay-*

ing thirty percent (30% of the premium required for such insurance (twenty percent (20%), beginning September 15, 1974). *The Company agrees to pay all such group insuarnce premiums required for the continuation of* existing Employee group insurance *with respect to any Employee* who reaches the age of sixty-two (62) years or more and who has fifteen (15) years or more of continuous employment with the Company, or *who retires* prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law and has fifteen (15) years' continuous employment with the Company, *and who retires* from active employment. *It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees are, in fact, retired* and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases."

(App. 10-11) (Emphasis added).

A strike occurred on September 15, 1975, after expiration of the collective bargaining agreements. The Company ceased all production operations at its facility on November 17, 1975. (Pet. App. 24).

Prior to January 1, 1976, the Company maintained group insurance policies pursuant to the above provisions under which the retired members of the Unions were third-party beneficiaries. However, by letter dated September 16, 1975, the Company informed the retired ex-employees that the life insurance coverage for all retirees would be discontinued on January 1, 1976 and medical insurance would cease on February 1, 1976, and has since refused to

reinstate same. As a result, the members of the Unions coming within the terms of the above contractual provisions who were former employees of the Company were denied the benefit of the group insurance coverage which the Company was obligated to provide pursuant to the terms of the collective bargaining agreements.

Weimer, a former employee/retiree who was adversely affected by the action of the Company terminating the insurance coverage, filed a class action complaint in the United States District Court for the Southern District of Ohio on behalf of himself and all other former employees/retirees of the Company who were members of the aforementioned Unions. The relief demanded in the complaint included a judgment of the District Court that the Company had unlawfully terminated the group insurance policies and was obligated to keep them in full force and effect and a mandatory injunction ordering the Company to reinstate the insurance policies.

Prior to the filing of the complaint in the instant action, the Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO Local 11 had filed a similar action in the same district court. Weimer had previously filed a motion to intervene in that action (App. 3), rather than filing a separate lawsuit, but said motion was denied by the District Court. (App. 5). Consequently, Weimer had no alternative other than to file a separate legal action.

Despite the denial of his motion to intervene, throughout this litigation Weimer's claim has been controlled by the proceedings in the Metal Polishers' case. The District Court dismissed his case *sua sponte*, without a hearing and without so much as an answer being filed by the Company. The sole basis for the dismissal was that Weimer

was somehow collaterally estopped on the basis of the decision against the Metal Polishers, even though he was not a party in that action.

Likewise, because of these patent irregularities and the confused record in the proceedings in the District Court, the Court of Appeals did not address the substantial claims raised by Weimer on appeal. Instead, the Court of Appeals disposed of the case by upholding the Metal Polishers' argument that these claims are not arbitrable. (Pet. App. 3).

Because of this order of the Court of Appeals, the substantial issues raised by Weimer are not before this Court through the Petition for a Writ of Certiorari. Although Weimer's claim was never submitted to arbitration, his argument must be limited to the question of whether the claim is arbitrable.

Weimer, however, does have an interest in the questions presented in the Petition. Because the issues were determined not to be subject to arbitration, it becomes all the more apparent that the decision in the Metal Polishers' case cannot be *res judicata* in regard to Weimer's claim when he was in no way a party to that proceeding deferring to arbitration.

ARGUMENT

I. The Company Has Failed To Demonstrate That The Decision Of The Court Of Appeals For The Sixth Circuit Is Anything But Consistent With The Decisions Of This Court.

A. The General Policy In Favor Of Arbitration Is Not Controlling.

The Company's claim that the decision of the Court of Appeals for the Sixth Circuit is contrary to the decisions of this Court rests almost exclusively on the general policy in favor of arbitration. While the existence of this policy is not contested, it is not so sweeping as the Company so strongly suggests. The Company would have this Court ignore the intricate and unique facts of this case in favor of this general policy. None of the authorities cited by the Company support such a wholesale approach to the issue. No such authority exists. The Company cannot establish arbitrability in the peculiar facts of this case by a mere citation to the *Steelworkers* trilogy.[2] Certiorari must be denied.

B. The *Maddox* Case Is Totally Inapplicable In Light Of The Facts.

The Company claims that this case is controlled by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). (Pet. at 12). *Maddox*, however, has no applicability to this case. *Maddox* dealt with a laid-off employee's obligation to utilize the grievance and arbitration procedure in a severance pay

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2. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

claim. Any analogy between that situation and the present situation, involving a claim by retirees, relating to their vested insurance rights, against a Company who has closed its facility, does not withstand analysis.

First, because Weimer was not an employee and was not part of the bargaining unit represented by the Union [*Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)], he was not a party to the collective bargaining agreement, and thus was not bound by its arbitration provision. As recognized in the *Steelworkers* trilogy and virtually every other case cited by the Company, it is elementary labor law that arbitration is inherently consensual, and no party is bound to arbitrate in the absence of such consent. Thus, as the Sixth Circuit held below, Weimer's claim is not subject to the contractual grievance procedure. Indeed, Weimer would not have had standing to sue the Company to compel arbitration of this claim. *Moruzzi v. Dynamics Corp. of America*, 443 F. Supp. 332 (S.D.N.Y. 1977). By its terms, the grievance procedure in the relevant collective bargaining agreement limits the right to file grievances to "any *Employee or group of Employees* covered" by the agreement. (Pet. App. 62) (Emphasis added). *Also see Burke v. Adams & Ellis of Ellis, Inc.*, 603 F.2d 114 (9th Cir. 1979). Because Weimer was no longer an employee, the grievance procedures were inapplicable and unavailable to him.

Furthermore, in *Pittsburgh Plate*, this Court expressly recognized that retirees' primary right of recourse for deprivation of vested contract rights is a suit under Section 301.

> "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer. . . .

> This does not mean that when a union bargains for retirees - which nothing in this opinion precludes if the employer agrees - the retirees are without protection. Under established contract principles, *vested retirement rights may not be altered without the pensioner's consent. . . . Retirees, moreover will have a federal remedy under §301 of the Labor Management Relations Act for breach of contract if their benefits were unilaterally changed."*

Id. at 181 n. 20 (Emphasis added). (*Citing Smith v. Evening News Assn.*, 371 U.S. 195 (1962); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960)). *Also see Moruzzi v. Dynamics Corp. of America*, 443 F. Supp. 332 (S.D.N.Y. 1977).

As the Sixth Circuit noted in its decision in *Hazen v. Western Union Telegraph Co.*, 518 F.2d 766 (6th Cir. 1975):

> "[T]he Supreme Court has implied that one in plaintiff's position has two avenues of recourse available without regard to acts or omissions of the union, which is under no statutory duty of fair representation to her. *See Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 181 n. 20, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). There it is indicated that a retired person who is no longer a member of a bargaining unit may either sue at common law under established contract principles or pursue a federal remedy under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of contract."

Id. at 769-70.

Thus, to uphold the Company's contention that Weimer's remedy is through arbitration rather than Section 301 would be to go directly contrary to the landmark case of *Pittsburgh Plate*. Such a result would deprive Weimer of one of the remedies expressly envisioned in that case,

and defeat Section 301's function of developing a federal body of law on questions such as these. Moreover, in light of *Pittsburgh Plate* and its progeny, Weimer would be without power to compel arbitration even if he were to consent to it. Thus, the Company's claim ignores existing precedent, and, if upheld, would effectively leave Weimer without a remedy.[3]

The *Maddox* decision is also inapplicable because it does not involve an expired collective bargaining agreement.

Finally, the Company's reliance on *Maddox* ignores the central thrust of the Sixth Circuit's decision. The Sixth Circuit found that, under the express terms of the collective bargaining agreements, disputes were not to be arbitrated unless the unions chose to do so. Because the union did not choose to exercise their option of seeking arbitration, the arbitration provisions in the contracts were inapplicable. (Pet. App. 3-4). *Maddox* involved no such contractual provision. The *Maddox* Court did not address the issue in the present case in holding or in dicta.

In short, the relevance of the *Maddox* decision to the present factual situation is limited to the general expression of a preference for arbitration. While the existence of this preference cannot be disputed, it does not go so far as to bind parties to arbitrate without their consent. The Petition for a Writ of Certiorari must be denied for this reason alone.

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3. Even if a union were to bring an action on behalf of retirees under this set of facts, as did the Metal Polishers in the companion case, it also would not be bound by the arbitration provisions in that it would no longer be acting as the representative of employees covered by the agreement. Once again, it is important to note that the entire grievance procedure is limited to complaints of active employees. (Pet. App. 62).

Likewise, it is unclear what significance *Chambers v. Beaunit Corp.*, 404 F.2d 128 (6th Cir. 1968), has to the decision in the present case. At most, *Chambers,* like *Maddox,* only stands for the proposition that when a matter is properly subject to arbitration under a collective bargaining agreement, the court should refrain from deciding the substantive issue involved. Because the Sixth Circuit in the instant case decided that the matter was not subject to arbitration under the unique facts of the case, *Chambers* is totally irrelevant.

C. The Rationale Behind *Boys Markets* Does Not Extend To The Present Case.

The Company's reliance on *Boys Markets, Inc. v. Retail Clerks' Union, Local 770,* 398 U.S. 235 (1970) (Pet. at 14), only serves to demonstrate the lack of authority supporting its Petition. *Boys Markets* was premised on a *quid pro quo* rationale. If a company desires a no-strike clause to be enforced through an injunction, it must display its good faith and willingness to reciprocate by honoring the arbitration provisions of the agreement. There is no similar *quid pro quo* rationale at work in the present case. There is no strike or threat of a strike. The Company has ceased operations and abandoned its employees. Weimer and the class of retirees which he seeks to represent, not being employees, have no economic threat at their disposal comparable to the strike. There is nothing that Weimer is seeking which is analogous to an injunction. Unlike in *Boys Markets,* the threat to industrial stability is nonexistent.

The *quid pro quo* rationale of *Boys Markets* was the product of a delicate balancing between the policies behind Section 301 and the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. Section 104. No such balancing is involved in the present case. While the Company

argues that the rationale of *Boys Markets* should be extended into this totally different context, it cites no authority for this extension. Such an extension would be unwarranted and unprecedented. *Boys Markets* has no bearing on the present case, and the Company's resort to such a distorted analogy as the basis for its Petition illustrates that there is no basis for the Petition at all.

D. Because The Presumption In Favor Of Arbitrability Has Been Expressly Refuted, *Nolde Brothers* Is Not Controlling.

Neither is this Court's decision in *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers,* 430 U.S. 243 (1977), controlling in light of the unique facts in the present case. First, as demonstrated above, because Weimer is not an employee and is thus not subject to the grievance procedures, his claim is not arbitrable. *Nolde Brothers* deals only with the duty of the parties to arbitrate a dispute which concededly falls within the arbitration provision of the agreement after that agreement has expired. Because Weimer's claim was not arbitrable even under an existing agreement, *Nolde Brothers* is of limited relevance. Moreover, *Nolde Brothers* does not provide that the duty to arbitrate a dispute survives the expiration of the collective bargaining agreement and the shutdown of the plant indefinitely. Unlike in *Nolde Brothers,* Weimer's claim did not arise until three and one-half months after the expiration of the contract and one and one-half months after the shutdown of the facility. *Nolde Brothers* does not suggest that the duty to arbitrate survives such a hiatus.

Finally, even under *Nolde Brothers'* standard that the presumption favoring arbitrability must be negated either expressly or by clear implication, the Court of Appeals

found below that the presumption was so negated. (Pet. App. 3-4). As that court noted, the agreement clearly and expressly provides that, even if the subject matter of the dispute is generally arbitrable, a procedural precondition to arbitrability is that the union request arbitration. There is no consent by a union to arbitration until such a request is made. Neither the court nor the Company can force the union to consent.[4] Because there was no request for arbitration, and thus no consent to arbitration, the dispute is not arbitrable.[5]

Contrary to the bald assertions by the Company, there are other provisions in the collective bargaining agreements which demonstrate that the *Nolde Brothers'* presumption was clearly negated. The paragraph in the agreements which prefaces the grievance steps provides:

> "Should any *Employee or group of Employees* covered by this Agreement believe that he or they have been unjustly dealt with or *that any provision of this Agreement has been or is being violated,* such matters shall be taken up as follows. . . ."

(Pet. App. 62) (Emphasis added).

Importantly, this paragraph clearly and expressly limits the use of the grievance procedures to "any Employee

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4. Parenthetically, it should be noted that the Company at no time requested nor consented to the arbitration of the dispute. It was only after a favorable decision by the arbitrator that the Company chose to defend the decision of the District Court to compel arbitration. (App. 12).

5. Even if the Company were correct that the collective bargaining agreements do not expressly preclude arbitration under this unique set of facts, there is at least a clear implication precluding such arbitration. Because the agreements only provided for procedures for the Union to request arbitration, the negative implication is that neither the Company nor anyone else could invoke the arbitration procedures, especially a retired employee.

or group of Employees covered by [the] Agreement." Because Weimer is not an employee under the *Pittsburgh Plate* doctrine, the grievance procedures, including the arbitration provision, are not applicable to him.

Moreover, the claims subject to the grievance procedure are only those arising when a specific provision of the agreement has been violated. Conversely, in *Nolde Brothers,* the grievance procedures were broadly applicable to any grievance arising between the parties. *Id.* at 245. The narrower dispute provisions in the present case are not indicative of an intent to arbitrate disputes arising long after the expiration of the agreement. Rather, this language indicates that "[a]ll disputes arising 'under' the agreement are to be arbitrated; those that are collateral to the agreement are not." *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80,* 605 F.2d 1290, 1296 (2nd Cir. 1979). Because Weimer's claim is based on vested benefits collateral to the expired agreement, the narrow grievance provisions are not applicable to his claim. Thus, contrary to the Company's assertions, the agreement, taken as a whole, supports the decision of the Sixth Circuit. The Petition for a Writ of Certiorari must be denied.

On page 16 of its Petition, the Company attempts to rewrite the decision of the Court of Appeals to support its tenuous arguments:

> "The Court did not find, as it could not, that the contractual language expressly precluded arbitration of these disputes; instead it improperly held that because the parties' contracts did not expressly *include* language permitting arbitration at the instigation of the court, rather than the union, the disputes were not within the grievance and arbitration provisions of the contract. . . ."

(Pet. 16) (Footnote omitted).

Even a cursory reading of the decision below reveals the inaccuracy of this contorted interpretation. In no uncertain terms, the Sixth Circuit held that:

> "[U]nder the *express* language of the collective bargaining agreement, the provisions which are the subject of the dispute in these appeals were not arbitrable, unless the Union requested arbitration. . . ."

(Pet. App. 3) (Emphasis added).

Thus, consistent with *Nolde Brothers*, the Sixth Circuit found that the agreements expressly precluded arbitration. The Company cannot give substance to its skeletal argument by rewriting the opinion below. The decision is consistent with precedent and amply supported by the facts. The Petition for a Writ of Certiorari must be denied.

II. There Is No Conflict Between The Decision Of The Sixth Circuit And Those Decisions Of Other Circuits With Respect To The Arbitrability Of Weimer's Claim.

In part two of its argument (Pet. App. 16), the Company cites a variety of lower court cases which support the general proposition that there is a presumption in favor of arbitrability. Once again, the existence of this presumption is not challenged. The question is whether or not presumption has been overcome in this particular set of facts where:

> (1) The collective bargaining agreements expressly provided only that the Union has the right to invoke the arbitration procedures;
>
> (2) The collective bargaining agreements have expired, and the Company's facility had shut down, long before the claim for benefits arose;

(3) The grievance procedures are limited to only those claims arising under the collective bargaining agreements, rather than more broadly providing for arbitration of all grievances arising between the parties; and

(4) The subject of the claim involves only the rights of retirees, who are not employees, who are not members of the bargaining unit, and who are not bound by the provisions of the collective bargaining agreements, and who cannot file grievances under the contract grievance procedures.

Importantly, the Company has failed to cite a single authority with even remotely similar facts in support of its claim that the decision of the Sixth Circuit conflicts with decisions of other Circuits. There are no such conflicting authorities. The Petition for a Writ of Certiorari must be denied.[6]

CONCLUSION

The Company's argument rests all but exclusively on the broad presumption in favor of arbitrability. While the existence of that presumption cannot be denied, the Court of Appeals found that the presumption was sufficiently negated under the unique facts of the present case. The Company has failed to cite a single authority in direct conflict with the decision. The sweeping generalizations and tenuous analogies relied on by the Company fail to demonstrate the necessity for resolution by

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6. Because part two of the Company's argument is little more than a restatement of its first argument, Respondent Weimer finds it unnecessary to burden this Court by repeating his position. Part one of Respondent Weimer's argument adequately disposes of all arguments raised in both part one and part two of the Company's Petition.

this Court. The Petition for a Writ of Certiorari must be denied.[7]

Respectfully submitted,

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Paul W. Weimer

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7. While it is recognized that consideration of an appropriate remedy is premature at this time, Respondent Weimer must express his objection to the remedy sought by the Company. The Court of Appeals for the Sixth Circuit expressly declined to decide other substantial issues raised by the parties because resolution of these issues was unnecessary to its decision. If this Court were to find that the Court of Appeals was in error, the only appropriate remedy would be a remand to that court for consideration of the other important issues raised on appeal. Reinstating the District Court's judgment in Weimer's case would be sanctioning that Court's *sua sponte* dismissal of Weimer's claim, without a hearing on the merits and without so much as an answer being filed by the Company.

Even if Certiorari is granted in *Kurz-Kasch, Inc. v. Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11*, the Petition must be dismissed in *Kurz-Kasch, Inc. v. Weimer*, so that Weimer may have his day in court without further delay.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division, at Dayton

No. C-3-78-173

PAUL W. WEIMER,
Plaintiff,

v.

KURZ-KASCH, INC.
Defendant.

ORDER

(Filed March 19, 1979)

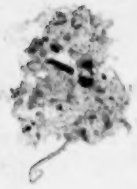
It appearing to the Court that all matters in controversy in the above matter have been disposed of by determination of the arbitrator in the matter of Metal Polisher, etc. v. Kurz-Kasch, Case No. C-3-76-184, the above entitled matter is hereby DISMISSED with prejudice.

It is so ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action File No. C-3-78-173



PAUL W. WEIMER,
Plaintiff,

vs.

KURZ-KASCH, INC.
Defendant.

JUDGMENT

(Filed March 15, 1979)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that upon the determination of Case C-3-76-184; the above entitled matter is hereby DISMISSED with prejudice.

Dated at Dayton, Ohio, this 15th day of March, 1979.

John D. Lyter
Clerk of Court
By: /s/ Rebecca E. Anderson
Rebecca E. Anderson,
Deputy

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division, at Dayton

Case No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

vs.

KURZ-KASCH, INC.
Defendant.

MOTION OF PAUL WEIMER TO INTERVENE AS PLAINTIFF

(Filed November 15, 1977)

PAUL WEIMER moves this Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene as plaintiff in this action on behalf of himself and all other persons, not represented by present plaintiff, who are retired former employees of Defendant Kurz-Kasch, Inc. who have been deprived of certain fringe benefits accorded to them by contract as alleged in the original complaint.

This Motion is instituted to assert a claim set forth in the proposed complaint of which a copy is attached hereto and incorporated by reference.

/s/ James R. Kirkland
James R. Kirkland, Trial Attorney
For Plaintiff Paul Weimer, On
His Own Behalf and On Behalf
of Other Retired Employees of
Kurz-Kasch, Inc.

Legler, Lang & Kuhns
1401 Talbott Tower
Dayton, Ohio 45402
1-513-224-7201

/s/ Robert T. Dunlevey, Jr.
Robert T. Dunlevey, Jr.
Of Counsel
Legler, Lang & Kuhns

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division

No. C-3-78-173

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

v.

KURZ-KASCH, INC.
Defendant.

ORDER

(Filed January 12, 1978)

This matter is before the Court upon the motion of Paul Weimer to intervene as a plaintiff in this action on behalf of a class of similarly situated former employees of defendant.

Since an appeal of the Court's order of April 5, 1977, is presently pending and since the outcome of that appeal may require Mr. Weimer's intervention in an arbitration proceeding, the Court is unwilling to grant intervention at this time.

Accordingly, the motion to intervene is hereby DENIED subject to resubmission upon the commencement of further proceedings in this court.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division

No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

v.

KURZ-KASCH, INC.,
Defendant.

ORDER

(Filed April 18, 1978)

This matter is before the Court upon the motion of Paul Weimer for reconsideration of the order of January 12, 1978, denying his motion to intervene.

Upon review of Weimer's memorandum, the Court concludes that his intervention in this action would not be appropriate. If he has rights which he wishes to assert, he must commence a separate suit.

Accordingly, the motion for reconsideration is hereby DENIED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action File No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

v.

KURZ-KASCH, INC.,
Defendant.

JUDGMENT

(Filed April 17, 1978)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of Paul Weimer for reconsideration is hereby DENIED.

John D. Lyter
Clerk of Court
By: /s/ Rebecca E. Anderson
Rebecca E. Anderson, Deputy

EXCERPTS

from AGREEMENT between

KURZ-KASCH, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 225, AFL-CIO

ARTICLE XV.

GROUP INSURANCE

105. It is agreed that Employees who are sixty-two (62) years of age or over or who retire prior to that age by reason of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment by the Company, may, upon retirement, continue their participating in existing group insurance plans applicable to such Employee by paying fifty percent (50%) of the premiums required for such insurance. The Company agrees to pay all such group insurance premiums required for continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-five (65) or more and who has fifteen (15) years or more continuous employment by the Company and who retires under normal retirement from active employment. The Company agrees to pay all such group insurance premium required for continuation of existing Employee group insurance with respect to any Employee who retires prior to age sixty-five (65) years of age under disability retirement in accordance with Federal Social Security Law from active employment, provided, such Employee has fifteen (15) years or more of continuous employment. It is understood

and agreed that such insurance premium payment provision shall continue only so long as such Employees, are in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved to the Company to pay such further retirement benefits in such cases as it may in its discretion determine advisable in individual cases.

EXCERPTS

from AGREEMENT between

KURZ-KASCH, INC.

and

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, Local 45

ARTICLE XVI.

GROUP INSURANCE

3. It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment with the Company, may, upon retirement, continue their participation in existing group insurance plans applicable to such Employee by paying thirty percent (30%) of the premium required for such insurance (twenty percent (20%), beginning September 15, 1974). The Company agrees to pay all such group insurance premiums required for the continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-two (62) years or more and who has fifteen (15) years or more of continuous employment with the Company, or who retires prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law and has fifteen (15) years continuous employment with the Company, and who retires from active employment. It is understood and agreed that such insurance premium payment provision shall

continue only so long as such Employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases.

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action File No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

vs.

KURZ-KASCH, INC.,
Defendant.

ORDER

(Filed May 4, 1977)

This matter is before the Court upon the defendant's motion for reconsideration of an order issued by this Court on April 5, 1977, requiring the parties to proceed to arbitration.

Defendant argues that the Union's claim is time-barred under the contract. Normally, failure to file a timely grievance is fatal to an employee's claim. *See, Chambers v. Beaunit Corporation,* 404 F.2d 128 (6th Cir. 1968); *Amalgamated Clothing Workers v. Ironall Factories Co.,* 386 F.2d 586 (6th Cir. 1967). However, we read *N.C.R. Employees' Independent Union v. National Cash Register Co.,* 489 F.2d 716 (6th Cir. 1973), *cert. den.* 416 U.S. 970 (1974), as creating a very narrow exception to this rule where unusual circumstances are presented.

As was stated in this Court's prior order, the *Nolde Brothers* decision resolved what had been a confused area

of the law. *See, e.g., Chattanooga Mailers Union Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1311 (6th Cir. 1975). When the parties' agreement expired in September of 1975, the Union could have reasonably considered the courts to be their sole forum for deciding this dispute. Under these circumstances, we believe that the holding in the N.C.R. Employees case is directly applicable.

Accordingly, defendant's motion is hereby DENIED.

It is so ORDERED.

(s) Carl B. Rubin, United States District Judge.